

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term 2004
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10 Argued: November 5, 2004

Decided: July 5, 2005

11 Errata Filed: July 18, 2005)

12
13 Docket No. 04-1142-cr
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16
17 UNITED STATES OF AMERICA,

18 Appellee,

19
20 - against -

21
22 LARRY G. ROWE,

23 Defendant-Appellant.
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27 Before:

28 WALKER, Chief Judge,
29 FEINBERG and WESLEY, Circuit Judges.
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32 Appellant Rowe appeals from a judgment of conviction in the United
33 States District Court for the Southern District of New York (Brieant,
34 J.) entered pursuant to a jury's convicting Rowe of advertising to
35 receive, exchange or distribute child pornography in violation of 18
36 U.S.C. § 2251(c) (1) (A). Conviction affirmed, sentence vacated and case
37 remanded.
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39 -----

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11 Appellee.
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15 FEINBERG, Circuit Judge:

16 Larry G. Rowe appeals from a judgment of conviction of the United
17 States District Court for the Southern District of New York (Brieant,
18 J.) entered after a jury found him guilty of advertising to receive,
19 exchange or distribute child pornography in violation of 18 U.S.C. §
20 2251(c) (now designated § 2251(d)).¹

¹ At the time of Rowe's conduct, 18 U.S.C. § 2251(c)
provided in relevant part:

(1) Any person who, in a circumstance described in
paragraph (2), knowingly makes, prints, or publishes,
or causes to be made, printed, or published, any
notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display,
distribute, or reproduce, any visual depiction,
if the production of such visual depiction
involves the use of a minor engaging in sexually
explicit conduct and such visual depiction is of
such conduct . . . shall be punished as provided
under subsection (d).

(2) The circumstance referred to in paragraph (1) is
that--

(A) such person knows or has reason to know that
such notice or advertisement will be transported
in interstate or foreign commerce by any means
including by computer or mailed; or

1 In April 2002, a detective on the Rockland County, New York
2 Computer Crime Task Force entered an internet chat room in which he saw
3 a posting that he believed to be an advertisement for child
4 pornography. Following the posting's instructions, the detective
5 connected to a computer eventually traced to Rowe's home in Pikeville,
6 Kentucky. Once linked to Rowe's computer, the detective attempted to
7 obtain a child- pornographic image without offering one in return as
8 required by the rules that Rowe had devised. The detective was
9 consequently disconnected. United States Secret Service agents later
10 executed a search warrant at Rowe's home, where they found a computer
11 hard drive containing thousands of child- pornographic images.
12 Thereafter, Rowe was charged with and convicted by a jury of
13 advertising to receive, exchange or distribute child pornography. We
14 affirm Rowe's conviction but vacate his sentence and remand for further
15 proceedings.

17 I. Background

18

(B) such notice or advertisement is transported
in interstate or foreign commerce by any means
including by computer or mailed.

18 U.S.C. § 2251(c) (2000). This language is now located in 18
U.S.C. § 2251(d), in which subsection (1) has been amended to
state that violators "shall be punished as provided under
subsection (e) [the penalty provision originally in subsection
(d)]." Prosecutorial Remedies and Tools Against the
Exploitation of Children Today Act of 2003 ("PROTECT Act"),
Pub. L. No. 108-21, 117 Stat. 650 (2003).

1 A. The investigation

2 At approximately one o'clock in the morning on April 5, 2002,
3 Shlomo Koenig, a detective on the Computer Crime Task Forces of both
4 the Rockland County Sheriff's Department and the United States Secret
5 Service, connected to the internet and entered a chat room titled
6 "preteen00."² The detective testified at Rowe's trial that the
7 "preteen00" chat room was "a room which I've known from prior
8 [experience] where there is trading of child porn." The detective also
9 testified that the name of the room "is used basically in the pedophile
10 community." Once in the chat room, the detective came across a posting
11 that read: "[v2.3b] Fserve Trigger: !tun Ratio 1:1 Offering: Pre
12 boys/girl pics. Read the rules. [1 of 2 slots in use]" (emphasis in
13 original). This text had been posted by a person with the screen name
14 "Tunlvd," a name later determined to belong to Rowe.

15 According to the government's undisputed explanation, "[v2.3b]"
16 indicated that the software program Rowe used was Panzer version 2.3b.
17 "Fserve Trigger: !tun" indicated that "!tun" was the password needed to
18 access the file server containing the images on Rowe's computer.
19 "Ratio 1:1" indicated that users wishing to download images from Rowe's
20 computer had to upload an equivalent number of images to his computer.
21 "Offering: Pre boys/girl pics" indicated that the images available on
22 Rowe's computer were pictures of pre-teen boys and girls. "Read the

² The parties' submissions refer to the chat room as both "preteen00" and "#0!!!!!!!!!!!!preteen00." For simplicity's sake, we refer to the chat room as "preteen00."

1 rules" indicated that a user wishing to download images had first to
2 read the rules of use. Finally, "[1 of 2 slots in use]" indicated that
3 two users could access Rowe's computer at the same time, and that one
4 user was doing so when Detective Koenig viewed the posting.

5 When the detective typed the "trigger," he was linked to Rowe's
6 computer. Once connected, he was presented with Rowe's rules of use,
7 which provided:

8 By entering this fserve you are agreeing that you are not a law
9 officer or affiliated with the law in any way and do not hold this
10 fserve nor owner there of accountable for anything you upload or
11 download. if u do i guess i'm just screwed:/ If you do not agree
12 to the above LEAVE NOW! (now for the rules)
13 Rules are
14 up only Pre (10-) no clothes no pube hair
15 if your pic won't up
16 i prolly have it already
17 im still sorting so there maybe stuff i havent pulled yet
18

19 After reading these rules, Detective Koenig reviewed and copied a text
20 list of the images available for download from Rowe's computer. That
21 list named files such as "dadfucking12yearold.jpg,"
22 "10yo_preteen_raped.jpg" and "incest kiddy rape.jpg." When the
23 detective attempted to download an image without also uploading one, as
24 the rules required, he was disconnected from Rowe's computer.

25 After verifying that the posting in the "preteen00" chat
26 room linked to Rowe's computer and that "Tunlvd" was Rowe, in June 2002
27 Secret Service agents executed a search warrant at Rowe's home. Among
28 the items seized was a computer hard drive found to contain
29 approximately 12,000 child-pornographic images and videos. As the
30 agents were searching Rowe's home, he spoke with one of them and, after

1 being informed of his right to remain silent, admitted that his screen
2 name was "Tunlvld," that he was likely in the "preteen00" chat room at
3 one o'clock in the morning on April 5, 2002, that he knew it was
4 illegal to download or upload child-pornographic images and that he had
5 downloaded approximately 6,000 such images and had uploaded an
6 equivalent number from his computer to other users.

7
8 B. The proceedings below

9 The following day, June 20, 2002, the government filed a one-count
10 criminal complaint in the Southern District of New York charging Rowe
11 with violating 18 U.S.C. § 2251(c). In February 2003, a federal grand
12 jury sitting in the Southern District of New York returned a single-
13 count indictment charging Rowe with violating § 2251(c).

14 Prior to trial, Rowe moved for a transfer of venue--on both
15 constitutional and convenience grounds--from the Southern District of
16 New York to the Eastern District of Kentucky, in which Rowe resided.
17 In his brief on the motion, Rowe anticipated the government arguing
18 that venue would be proper in any district from which one might read
19 Rowe's online posting. Rowe argued that such a rule would "give[] the
20 prosecution tremendous and improper freedom within which to determine
21 as a matter of its own discretion where to bring a case." At the
22 hearing on the motion, Rowe emphasized that under such a theory, venue
23 for prosecuting criminal internet advertisers would be proper "any
24 place in the world."

1 In deciding Rowe's motion, the district judge first noted that
2 Article III's venue provision "essentially requires a determination of
3 where the crime occurred." The judge next observed that for offenses
4 committed in more than one judicial district, "venue is proper, both
5 under the Constitution and under the Federal Rules of Criminal
6 Procedure, in any district in which such offense was begun, continued
7 or completed. That's a quotation from Title 18 of the United States
8 Code Section 3237, Subparagraph A."³ The judge then noted this
9 Circuit's "substantial contacts" test for determining proper venue, and
10 analyzed the facts of Rowe's case under the test's factors. Responding
11 to Rowe's contention that locating venue in the Southern District
12 "gives the prosecution improper discretion in determining where to
13 prosecute a crime[,] " the judge "reject[ed] that argument."

14 Specifically, the judge concluded that "this crime occurred in any
15 district in which the advertisement appeared; that is to say, anywhere

³ 18 U.S.C. § 3237(a) provides:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

1 where the Internet chat room was accessible and was actually accessed
2 by anybody." After thus finding venue in the Southern District
3 constitutionally proper, the judge also denied Rowe's motion to
4 transfer venue for the sake of convenience or in the interests of
5 justice.

6 Rowe was tried before a jury in November 2003. When the
7 government rested its case, Rowe moved for judgment as a matter of law
8 on the argument that the "preteen00" chat-room posting identified in
9 the indictment "does not make a reference to child pornography. . . .
10 [T]he charged conduct is only whether or not that specific [posting]
11 amounts to a specific solicitation for exchange of child pornography,
12 and the defendant asserts that it does not." The district judge denied
13 the motion, finding that the "government's evidence can't be viewed in
14 isolation [The posting] invites the reader to amplify the
15 statement . . . by reference to [Rowe's] rules, which . . . are
16 adequate, in the Court's views, to indicate that there is an intention
17 [to] offer or receive only pre-age 10 with no clothes and no pubic
18 hair." The district judge concluded that "these exhibits are adequate
19 to charge validly and prove the offense of the indictment" The
20 district judge also refused to direct acquittal on the argument that
21 the posting did not travel through interstate commerce.

22 The defense put its case on and Rowe eventually took the stand,
23 claiming that his posting in the "preteen00" chat room was not an
24 advertisement to exchange child pornography, but a link intended for

1 someone with the screen name "BabyK" to use to gain access to Rowe's
2 computer. According to Rowe, "BabyK" was a woman who claimed to be the
3 "Katie" from a website called "Katie's-World."⁴ Rowe testified that he
4 "was totally infatuated and head-over-heels in love with ['BabyK']
5 within -- within three days" of meeting her in the "preteen00" chat
6 room. Rowe further testified that "BabyK" told him "that she had been
7 raped by four men," and that "she sent [Rowe] the pictures paralleling
8 what had happened to her" so that Rowe could understand her. Rowe
9 implied that the child-pornographic images found on his computer had
10 been uploaded by "BabyK," to whom he had given "complete, total access
11 to [his] machine." The posting placed in the "preteen00" chat room was
12 merely, Rowe claimed, a convenient means of assuring "BabyK" access to
13 Rowe's computer: "the message that -- [the Secret Service agents]
14 referred to it as an advertisement. It was a message between me and
15 ['BabyK']. And I never in any way ever considered it an
16 advertisement." Rowe did not explain why, if this was the case, his
17 posting was "Offering: Pre boys/girl pics" (emphasis in original), why
18 a reader of the posting should "Read the Rules" or why there was "1 of
19 2 slots in use."

20 The jury found Rowe guilty. At sentencing, the district judge and
21 Rowe's attorney both expressed the belief that Rowe's crime carried a
22 mandatory minimum of 10 years in prison. The district judge voiced his

⁴ A married couple, Lauren and James Dougherty, run the "Katie's-World" website. Ms. Dougherty, when called to the stand, testified that she did not know Rowe.

1 displeasure with this, stating that "statutory minimums generally
2 create a problem" and that "this may be a classic case where the issue
3 of proportionality is presented." The judge sentenced Rowe to 10 years
4 in prison followed by three years of supervised release. The judge
5 also ordered Rowe to undergo sex-offender treatment and forbade him
6 from having any deliberate contact with any child under 17 years of age
7 without the permission of a probation officer.

8 This timely appeal followed.

10 II. Discussion

12 On appeal, Rowe argues principally that his posting was not a
13 "notice or advertisement" within the meaning of § 2251(c), that venue
14 was improper and that his sentence of 10 years in prison violates the
15 Eighth Amendment. We consider these arguments in turn.

17 A. Was Rowe's posting a "notice or advertisement" under § 2251(c)?

18 Rowe argues that his posting "does not meet the definition of an
19 advertisement prohibited [by 18] U.S.C. § 2251(c)," and that his
20 conviction must therefore be reversed. The government apparently
21 asserts that this is an argument regarding the sufficiency of the
22 evidence, and thus urges a deferential standard of review. We believe
23 Rowe's argument is more accurately characterized as a purely legal
24 question of statutory interpretation, and we therefore review the

1 district judge's ruling de novo. See, e.g., *Field v. United States*,
2 381 F.3d 109, 111 (2d Cir. 2004).

3 Rowe placed his posting--"[v2.3b] Fserve Trigger: !tun Ratio 1:1
4 Offering: Pre boys/girl pics. Read the Rules. [1 of 2 slots in use]"
5 (emphasis in original)--in the "preteen00" chat room. The government
6 maintains that "this chatroom was devoted to the exchange of child
7 pornography images," and that typical postings included "anybody with
8 baby sex pics for trade?" and "young teen amateur movie . . . cum, gag,
9 teen gangbang, non-nude, and more" Rowe does not dispute the
10 government's characterization, and effectively concedes it by arguing
11 that "the context of the chat room . . . [and] the presence of other
12 explicit advertisements for child pornography in the chat room [do not]
13 make the [posting] an advertisement prohibited by [18] U.S.C. §
14 2251(c)." Rowe contends, as he did unsuccessfully below, that "nothing
15 in [his posting] . . . indicates that pornography is involved of any
16 kind" His posting in the chat room, Rowe asserts, "is only an
17 advertisement offering pictures of 'preboys/girl.'"

18 Contrary to what Rowe would have us hold, "only" offering pictures
19 of children in a "preteen00" chat room peppered with queries such as
20 "anybody with baby sex pics for trade?" is sufficient to constitute a
21 "notice or advertisement" within the meaning of § 2251(c). As the
22 government aptly characterizes it, "Rowe's decision to place into this
23 forum his notice that he was 'Offering: Preboys/girl pics' could have

1 had only a single purpose -- to advise others that he had child
2 pornography available for trade."

3 Rowe insists that his posting is beyond the scope of § 2251(c)
4 because it "does not by its very terms indicate it is seeking or
5 offering materials of a pornographic nature." Rowe cites no authority
6 to support this proposition, which is belied by § 2251(c)'s plain
7 language, case law and common sense. Section 2251(c) makes it a crime
8 to "knowingly make[], print[], or publish[] . . . any notice or
9 advertisement seeking or offering . . . any visual depiction, if the
10 production of such visual depiction involves the use of a minor
11 engaging in sexually explicit conduct and such visual depiction is of
12 such conduct." 18 U.S.C. § 2251(c) (1) (A). As a recent district court
13 decision in this Circuit correctly observed, "there is no requirement
14 that an advertisement must specifically state that it offers or seeks a
15 visual depiction to violate § 2251(c) (1) (A) '[N]o particular
16 magic words or phrases need to be included.'" United States v. Pabon-
17 Cruz, 255 F. Supp. 2d 200, 218 (S.D.N.Y. 2003) (quoting jury charge),
18 aff'd in relevant part, 391 F.3d 86 (2d Cir. 2004).

19 The question here is thus whether Rowe knowingly offered or sought
20 images depicting minors engaged in sexually explicit conduct. There is
21 no doubt that he did. Section 2251(c) is not so narrow that it
22 captures only those who state, "I have child-pornographic images for
23 trade." We agree with the government that if that were the case, then
24 "all a distributor of child pornograph[y] need do to avoid § 2251(c) is

1 use a modicum of sub[t]lety in describing the images sought or
2 offered." We further agree that "Congress did not intend its bar on
3 advertising for child pornography to be so easily evaded." We
4 therefore affirm the district judge's ruling that Rowe's chat-room
5 posting was a "notice or advertisement" within the meaning of §
6 2251(c).

7
8 B. Was venue in the Southern District proper?

9 Rowe argues that venue in the Southern District of New York was
10 improper and thus that the district judge erred in denying his motion
11 to transfer the case to the Eastern District of Kentucky, where Rowe
12 resided and used his computer to post the advertisement at issue. The
13 government maintains that both venue and the district judge's ruling
14 were proper. We review de novo. See, e.g., *United States v. Geibel*,
15 369 F.3d 682, 695 (2d Cir. 2004).

16 The question of what a proper venue is for a § 2251(c) prosecution
17 is one of first impression in this Circuit. It appears, in fact, that
18 no other federal court has yet ruled on this matter.

19 We begin with the observation that "[v]enue in federal criminal
20 cases is controlled by a complicated interplay of constitutional
21 provisions, statutes, and rules." 2 Charles Alan Wright, *Federal*
22 *Practice and Procedure* § 301 (3d ed. 2000). The Constitution mentions
23 venue in two places. First, Article III provides that the "Trial of
24 all Crimes . . . shall be held in the State where the said Crimes shall

1 have been committed” U.S. Const. art. III, § 2, cl. 3.
2 Second, the Sixth Amendment guarantees that “[i]n all criminal
3 prosecutions, the accused shall enjoy the right to a speedy and public
4 trial, by an impartial jury of the State and district wherein the crime
5 shall have been committed” U.S. Const. amend. VI. These
6 provisions have been read to afford defendants a right to be tried in
7 the district in which the charged crime was committed. 2 Fed. Prac. &
8 Proc. § 301. In particular, the case law suggests that these
9 provisions were designed to protect defendants from the bias and
10 inconvenience that may attend trial in a forum other than one in which
11 the crime was committed. See, e.g., United States v. Johnson, 323 U.S.
12 273, 275, 278 (1944) (noting the unfairness of requiring trial before
13 “a tribunal favorable to the prosecution” as well as the “difficulties,
14 financial and otherwise,” of being tried in “places remote from home”);
15 United States v. Cores, 356 U.S. 405, 407 (1958) (“The provision for
16 trial in the vicinity of the crime is a safeguard against the
17 unfairness and hardship involved when an accused is prosecuted in a
18 remote place.”). In addition to these constitutional provisions, there
19 are various substantive statutes that lay venue for particular crimes,
20 as well as Federal Rule of Criminal Procedure 18, which provides that
21 “[u]nless a statute or these rules permit otherwise, the government
22 must prosecute an offense in a district where the offense was
23 committed.”

24 In this Circuit, we pointed out some time ago that

1 there is no single defined policy or mechanical test to determine
2 constitutional venue. Rather, the test is best described as a
3 substantial contacts rule that takes into account a number of
4 factors--the site of the defendant's acts, the elements and nature
5 of the crime, the locus of the effect of the criminal conduct, and
6 the suitability of each district for accurate factfinding
7

8 United States v. Reed, 773 F.2d 477, 481 (2d Cir. 1985). In United
9 States v. Rodriguez-Moreno, 526 U.S. 275 (1999), the Supreme Court
10 instructed that a district court determining the suitability of a
11 particular venue "must initially identify the conduct constituting the
12 offense (the nature of the crime) and then discern the location of the
13 commission of the criminal acts." Id. at 279.

14 As for the "conduct constituting the offense," § 2251(c) makes it
15 a crime to "knowingly make[], print[], or publish[], or cause[] to be
16 made, printed, or published, any notice or advertisement seeking or
17 offering [child pornography]." 18 U.S.C. § 2251(c)(1)(A). The statute
18 requires that violators knew or had reason to know that their notice or
19 advertisement would be "transported in interstate or foreign commerce
20 by any means including by computer or mailed," id. § 2251(c)(2)(A), or
21 simply that the notice or advertisement was in fact so transported.
22 Id. § 2251(c)(2)(B). Section 2251(c)'s "conduct constituting the
23 offense" is thus the publication of an offer, expected to be or
24 actually communicated across state lines, to provide, receive or
25 exchange child pornography. We hold in Part II.A., supra, that Rowe's
26 posting in the "preteen00" chat room was an offer to exchange child
27 pornography, and there is no dispute that the offer was transported in
28 interstate commerce by computer.

1 We must therefore "discern the location of the commission of the
2 criminal acts." Rodriguez-Moreno, 526 U.S. at 279. "[W]here a crime
3 consists of distinct parts which have different localities the whole
4 may be tried where any part can be proved to have been done.'" Id. at
5 281 (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916)). See
6 also Reed, 773 F.2d at 480 ("[W]here the acts constituting the crime
7 and the nature of the crime charged implicate more than one location,
8 the [C]onstitution does not command a single exclusive venue."). The
9 government contends--and Rowe does not disagree--that the "offense
10 created by § 2251(c) is clearly a continuing offense." The government
11 maintains that what it calls a "continuing offense" is defined in 18
12 U.S.C. § 3237(a), which states in part that "any offense against the
13 United States begun in one district and completed in another, or
14 committed in more than one district, may be inquired of and prosecuted
15 in any district in which such offense was begun, continued, or
16 completed."

17 In Johnson, the Supreme Court stated that venue is proper in any
18 district "through which force propelled by an offender operates." 323
19 U.S. at 275. A number of decisions have subsequently cited § 3237(a)
20 to find venue proper in any such district. See, e.g., Rodriguez-
21 Moreno, 526 U.S. at 282 (venue of prosecution for carrying a firearm in
22 relation to any crime of violence was proper in district where
23 kidnapper took victim, even though kidnapper's use of firearm occurred
24 outside that district); United States v. Chen, 378 F.3d 151, 160 (2d

1 Cir. 2004) (venue of prosecution for extortionate loan collection was
2 proper in district where loan initiated, even though extortionate
3 collection occurred outside that district); *United States v. Sutton*, 13
4 F.3d 595, 599 (2d Cir. 1994) (per curiam) (venue of prosecution for
5 mailing fake driver's licenses was proper in district to which licenses
6 were sent, even though defendant mailed licenses from outside that
7 district).

8 Although none of those decisions involved crimes committed over
9 the internet, at least one Circuit has applied 18 U.S.C. § 3237(a) to
10 internet crime. In *United States v. Thomas*, 74 F.3d 701 (6th Cir.
11 1996), the Sixth Circuit affirmed a couple's conviction for operating
12 an electronic bulletin board from which paying subscribers could
13 download obscene images. The couple lived in and ran the bulletin
14 board from California, but were prosecuted in the Western District of
15 Tennessee after a federal postal inspector there, acting on the
16 complaint of a private individual, subscribed to the bulletin board and
17 obtained the images found to be obscene. To gain access to the
18 bulletin board, the inspector--and every other subscriber--had to
19 submit a signed application form, along with a \$55 fee, indicating the
20 applicant's age, address and telephone number. After the inspector
21 pseudonymously submitted the form and fee, one of the defendants called
22 him "at his undercover telephone number in Memphis, Tennessee,
23 acknowledged receipt of his application, and authorized him to log-on
24 with [the defendant's] personal password." 74 F.3d at 705. The Sixth

1 Circuit reasoned that, because “there is no constitutional impediment
2 to the government’s power to prosecute pornography dealers in any
3 district into which the material is sent,” id. at 709 (quoting *United*
4 *States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982)), venue in
5 Tennessee was proper pursuant to § 3237(a) because “Defendant Robert
6 Thomas knew of, approved, and had conversed with [a bulletin board]
7 member in that judicial district [the Western District of Tennessee]
8 who had his permission to access and copy [the images] that ultimately
9 ended up there.” Id. at 710.

10 Rowe did not intentionally transact business with a New Yorker in
11 the same way that the Thomases authorized a paying client in Tennessee
12 to access their pornography, but we believe that Rowe’s conduct
13 nevertheless amounted to a continuing offense committed in New York.
14 As the district judge reasoned, Rowe

15 must have known or contemplated that the advertisement would be
16 transmitted by computer to anyone the whole world over who logged
17 onto the site and entered the chat room It is clear that
18 the chat room could be entered in this district and in fact was
19 entered in this district It is clear that both the
20 statutes and the case law and the Constitution permit crimes of
21 this sort to be prosecuted in any jurisdiction where any part of
22 the crime occurred

23
24 We agree. Section 3237(a)’s language is broad, and Rowe’s act of
25 publishing an internet advertisement to trade child pornography can
26 readily be described as an “offense involving . . . transportation in
27 interstate . . . commerce.” 18 U.S.C. § 3237(a). Moreover, the
28 district judge found venue proper in light of the factors listed in
29 this Circuit’s “substantial contacts” test. Finally, the two chief

1 ills that the constitutional venue provisions are meant to guard
2 against--bias and inconvenience--are not substantially present in this
3 case. Rowe offered no evidence that New York juries disfavor the
4 conduct at issue any more than Kentucky juries, nor did he demonstrate
5 that trial in New York would--or did--impose an undue burden on him.

6 We therefore affirm the district judge's ruling that venue in the
7 Southern District of New York was proper in this case.

8
9 C. Sentence

10 Rowe argues that his 10-year prison sentence is disproportionate
11 to his crime and thus violates the Eighth Amendment. This argument is
12 moot in light of a case decided in this Court after Rowe's appeal was
13 briefed and argued. In *United States v. Pabon-Cruz*, 391 F.3d 86 (2d
14 Cir. 2004), we vacated the defendant's sentence and remanded for
15 resentencing after holding that a violation of § 2251(c) did not
16 require imposition of a 10-year mandatory minimum sentence. As worded
17 when Mr. Pabon-Cruz was prosecuted, § 2251(c)'s penalty provision
18 stated that violators "shall be fined under this title or imprisoned
19 not less than 10 years nor more than 20 years, and both." 18 U.S.C. §
20 2251(d) (emphasis supplied).⁵ This same language applied when Rowe
21 committed his crime. As we observed, "the 'and both' language . . .

⁵ The penalty provision has since been redesignated and
reworded to provide that violators "shall be fined under this
title and imprisoned not less than 15 years nor more than 30
years" 18 U.S.C. § 2251(e) (emphasis supplied).

1 makes no sense as a matter of grammar, usage, or law" 391 F.3d
2 at 105. Accordingly, we held that

3 the District Court had the discretion to sentence defendant to
4 either a fine or a term of imprisonment of not less than ten years
5 or both. Because this was not clear to the parties or to the
6 District Court at the time of sentencing, we are required to
7 vacate the sentence and remand the cause to the District Court for
8 resentencing consistent with our opinion here and with such
9 Sentencing Guidelines as may be applicable in the circumstances
10 presented.

11
12 Id.

13 It is clear from the record here that neither the parties nor the
14 district judge were aware that the judge was not required to sentence
15 Rowe to a term of imprisonment of at least 10 years. Rowe's Sentencing
16 Guidelines range was 97-121 months, but the district judge stated at
17 sentencing that "[t]he Court's understanding is that there's a ten-year
18 statutory minimum which trumps the low end of the guidelines" such that
19 Rowe's effective range was 120-121 months. Defense counsel agreed: "I
20 understand that there's a mandatory minimum here that supersedes." It
21 is also clear from the record that the district judge was troubled by
22 what he thought was § 2251(c)'s mandatory minimum:

23 I think that statutory minimums generally create a problem. I
24 think this may be a classic case where the issue of
25 proportionality is presented. I do not condone in any way
26 anything Mr. Rowe did, but I really think that the perpetrator who
27 distributes 15 kilograms of cocaine [and who is subject to a
28 sentence as short as 121 months under the Guidelines] is worse . .
29 . . The Court believes there's a serious issue of proportionality
30 here. [But t]he Court does not believe that it is in a position
31 of defying the act of Congress

32 Since Rowe was not subject--despite the parties' and district
33 judge's belief to the contrary--to a mandatory minimum of 10 years in

1 prison, we must vacate his sentence. Pursuant to § 2251(c)'s penalty
2 provision, the district judge on remand will have the "discretion to
3 sentence defendant to either a fine or a term of imprisonment not less
4 than ten years or both." Pabon-Cruz, 391 F.3d at 105. And as we did
5 in Pabon-Cruz, we "remand the cause to the District Court for
6 resentencing consistent with our opinion here and with such Sentencing
7 Guidelines as may be applicable in the circumstances presented."⁶ Id.
8 In light of the Supreme Court's decision in United States v. Booker,
9 125 S. Ct. 738 (2005), and our decision in United States v. Selioutsky,
10 409 F.3d 114 (2d Cir. 2005) (holding that subsection 3553(b)(2) of
11 U.S.C. Title 18 must be excised pursuant to Booker), the district court
12 must resentence Rowe under a regime of advisory Sentencing Guidelines.
13 "[T]he sentencing judge must consider the factors set forth in 18
14 U.S.C. § 3553(a), including the applicable Guidelines range and
15 available departure authority . . . [and] may then impose either a
16 Guidelines sentence or a non-Guidelines sentence." 409 F.3d at 117.

18 III. Conclusion

19
20 We affirm the district judge's rulings that Rowe posted an
21 "advertisement or notice" within the meaning of 18 U.S.C. § 2251(c) and

⁶ In his appellate brief, Rowe reiterated certain objections he made to the district judge regarding how his sentence range was calculated pursuant to the Guidelines. We need not rule on these objections, as Rowe will have the opportunity to present them again to the district judge upon remand.

1 that venue was proper. We therefore affirm Rowe's conviction, but
2 vacate his sentence in light of Pabon-Cruz and remand for resentencing.

3 _____

4 _____

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